

**BEFORE THE STRUCTURAL PEST CONTROL
DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
Agricultural Commissioner of
the County of Los Angeles
(County File No. 07082032)

Administrative Docket No. S-015

DECISION

**Everado Jimenez Ramirez
C/o Beneficial Exterminating, Inc.
5135 West Rosecrans Avenue
Hawthorne, CA 90250**

Appellant./

Procedural Background

Pursuant to Business and Professions Code (BPC) section 8617, and Food and Agricultural Code (FAC) section 15202, the County Agricultural Commissioner (CAC) may levy a civil penalty up to \$5,000 for a violation of California's structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Los Angeles CAC found that Everado Jimenez Ramirez (appellant) violated Section 8505.7 of the California Business and Professions Code (B&P Code) by failing to secure the premises against entry until the end of exposure period and until safe for occupancy. The CAC levied a fine of \$400 for the violation.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee were Peter Giammarinaro for the structural pest control industry, Dennis Patzer for the Structural Pest Control Board (SPCB), and Jodi Clary for the Department of Pesticide Regulation (DPR). Neither party requested oral argument. The appellant was assisted in his representation by Lee Whitmore, Vice President of Beneficial Exterminating. The Los Angeles CAC was represented by Greg Creekmur.

Standard of Review

The Committee decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner's decision. The Committee notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In making the substantial evidence determination, the Committee draws all reasonable inferences from the information in the record to support the findings and reviews the record in the light most favorable to the commissioner's decision. If the Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

Factual Background

On October 5, 2007, an inspector from the Los Angeles CAC's office visited the site of a house fumigation in Pasadena, California. Upon arrival, the inspector noted that the house had been untarped but was still posted as unsafe to enter. The crew was not present. The inspector walked around the house to determine if effective secondary locks had been installed on the outer doors to prevent entry by the homeowner or a member of the public. The inspector noticed an orange ball lock placed on the back door of the garage. When she pushed on the door, it opened. She was able to reach inside and determine that the lever of the doorknob was in the horizontal position. She switched the lever to the vertical position and closed the door. When the inspector pushed on the door again, it opened. She then closed the door with more force. The door closed completely, the lock engaged, and the door would not open when pushed.

The CAC issued a Notice of Proposed Action (NOPA) on December 20, 2007 and proposed to fine Everado Jimenez Ramirez (the licensee in charge of the site) the sum of \$400. The NOPA charged Ramirez with a "moderate" violation based on the existence of a reasonable possibility of creating a health effect. Ramirez' requested hearing was held on March 12, 2008. After hearing the evidence, the Hearing Officer found that Ramirez violated BPC section 8505.7 and that the fine in the moderate range at the mid-range of the level was justified. Ramirez filed this appeal before the Disciplinary Review Committee.

Applicable Statutes and Regulations

Business and Professions Code (BPC) section 8505.7 states "[t]he space to be fumigated shall be vacated by all occupants prior to the commencement of fumigation, and all entrances thereto shall be locked, barricaded, or otherwise secured against entry until the end of exposure period, then opened for ventilation and relocked, barricaded, or otherwise secured against re-entry, until declared by the licensee exercising direct and personal supervision over the fumigation to be safe for reoccupancy."

The implementing regulation (16 CCR section 1970.3) explains the phrase "locked, barricaded, or otherwise secured against entry" as meaning that all structures, prior to

fumigation, shall have a secondary lock on all outside doors. A secondary lock is to secure and prevent a door from being opened by anyone other than the licensee in charge.

CCR, title 16, section 1922 defines a “moderate” violation as one that is a repeat minor violation or a violation which poses a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$250-1,000.

Appellant's Contentions

Appellant contends that the back door to the garage was inoperable and would not open despite his attempts and the attempts of two of the crewmembers. Appellant asserts that the door had been painted shut. Appellant believes that someone else entered the property and opened the door between the time he left at 9:15 a.m. and the time the inspector arrived at 2:15 p.m.

The Hearing Officer's Determination

The hearing officer discussed Mr. Ramirez' testimony in depth. Mr. Ramirez testified that he entered the garage and house wearing self-contained breathing equipment and opened the door and windows to accomplish aeration. Four windows and a side door in the house would not open and appeared to be painted shut. Mr. Ramirez testified that he entered the garage to open the back door. He opened the two small barrel catches on the door, turned the doorknob mechanism, and pushed for “several minutes” in an attempt to open the door. He was unable to open the door and determined it was inoperable. He did not reengage the barrel catches or the doorknob lock. Two crewmembers testified that they checked the door and were not able to open it prior to leaving the site. They did not lock the door. Mr. Ramirez placed an orange ball (or clamshell) lock on the door, resealed the house and garage and left the premises¹.

The hearing officer concluded that while the door might have been painted shut or otherwise “stuck”, there was no credible evidence of a break-in, and if Ramirez would have re-secured the locks he could have prevented re-entry. The hearing officer concluded that the failure to secure against re-entry was in violation of B&P Code section 8505.7. The hearing officer also found that the fine in the moderate range was appropriate because the failure to secure the premises raised a reasonable possibility of a health effect and that the fine in the mid-range (\$400) was also appropriate.

Analysis

Mr. Ramirez, Mr. Leon, and Mr. Toledo all testified that they tested the back door of the garage before they left the premises and were unable to open the door. Respondent offered photographic evidence of the door showing how the paint seal had been broken and paint chips created when the door was opened. The Respondent also provided letters from the owner of the property and the past tenant stating that the door was painted shut and had not been opened in

¹ The clamshell lock covers the doorknob so that the doorknob cannot be turned and opened.

over ten years. It is undisputed that the inspector found the door unsecured. It is also undisputed that Mr. Ramirez did not reengage the locks because he felt the door was inoperable.

There was some indication that someone might have broken into the property based on photographs of paint and wood chips found on the ground, and the owner's report of a different truck in the driveway earlier on the day of the inspection. But the hearing officer did not find this evidence credible and the determination of credibility is within the hearing officer's sole province. The hearing officer reasoned that if Mr. Ramirez had exerted minimal effort and reengaged the locks, the door would have been secured properly and entry would not have occurred.

The Committee is in disagreement as to the sufficiency of the evidence in support of the violation. Two members feel sufficient evidence exists in the record to support the likelihood that the door was forced open between the time the crew left and the inspector arrived and that the county failed to provide substantial evidence that the door was not properly secured at the time Respondent left the premises. The third member feels that sufficient evidence in the form of Mr. Ramirez' testimony that he did not re-secure the locks on the door, and the inspector's testimony that the door was not secure when she arrived after the crew's departure and that she did not see signs of a break-in, supports the hearing officer's finding that the Respondent failed to secure the door. There is no exception to the requirement to secure a door based on the belief of the crew that it is inoperable.

Conclusion

The majority of the committee votes to overrule the CAC and reverse the decision.

Disposition

The Los Angeles CAC's decision is overruled.

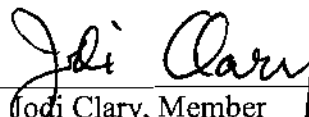
Judicial Review

BPC section 8662 provides the appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure section 1094.5. No review is available to the CAC.

STATE OF CALIFORNIA DISCIPLINARY REVIEW COMMITTEE

Dated: August 11, 2008

By: _____



Jodi Clary, Member
For the Disciplinary Review Committee